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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. _____

RICARDO PABLO BARRON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Ricardo Pablo Barron, respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review its judgment affirming a judgment of the United States

District Court for the Southern District of California, sentencing petitioner to five years imprisonment.

This case squarely presents the issue of the right of immigration officers to search a vehicle at a border checkpoint, the same issue before this Court in Condrado Almeida-Sanchez v. United States of America (No. 71-6278). This counsel has filed an Amicus Curiae brief in support of the Petitioner in that case. Moreover, the checkpoint in the present case was 67 miles from the Mexican border and on the major north-south highway in California and the West Coast. Finally, the arguments in this case, (see Argument III) transcend and are different than those presented in the briefs for Petitioner and Respondent in Almeida-Sanchez and should be evaluated before the legitimacy of the border-checkpoint inquiry is determined.

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OPINION BELOW

Trial in the Federal District Court was by Court.

The opinion of the Court below is appended hereto as Appendix "B" and is also found in the Clerk's Record of the Circuit Court. The opinion of the Court below is as yet not reported. The judgment of the Court below is appended hereto as Appendix "C". A copy thereof also appears in the clerk's transcript from the Circuit Court.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The date of the judgment sought to be reviewed and the time of its entry is January 29, 1973 (R.C.A. Judgment).

The statutory provision believed to confer on this court jurisdiction to review the judgment in question by Writ of Certiorari is 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

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I

THE EXCEPTION ALLOWING WARRANTLESS SEARCHES UNDER 8 U.S.C. § 1357(a) AND DEFINED BY REGULATION 8 C.F.R. § 287.1(a)(2) CONTRAVENES PROTECTIONS AFFORDED BY THE FOURTH AMENDMENT.

A./ No apparent reason exists why fourth amendment principles do not apply with the same force to searches of automobiles for smuggled aliens as they do to similar searches for smuggled merchandise. The trial court erred in basing its evidentiary ruling upon this distinction.

II

THERE WAS NO PROBABLE CAUSE TO JUSTIFY THE DETENTION OR SEARCH OF APPELLANT'S VEHICLE AT SAN CLEMENTE.

A./ There is no rational justification for allowing 8 U.S.C. § 1357(a) to serve as a blanket exception to the Fourth Amendment requirement of probable cause.

B./ The fact that Petitioner did not stop

in the area indicated by the agents, but instead proceeded through the checkpoint, is not relevant to whether the officers had probable cause to search.

III

THIS COURT MUST IN ACCORD WITH ITS CONSTITUTIONAL DUTY TO ANNUL STATUTES AND REGULATIONS VIOLATIVE OF THE CONSTITUTION STRIKE DOWN THIS UNWARRANTED GOVERNMENT BID FOR LEBENSRAUM AS IMPLEMENTED BY GOVERNMENTAL REGULATIONS RESCINDING THE SEARCH AND SEIZURE RIGHTS OF OUR CITIZENS DENYING THEM EQUAL PROTECTION OF THE LAWS, ABRIDGING THEIR RIGHT TO TRAVEL, COMPRESSING THEM INTO THE REFUGE OF MIDDLE AMERICA, DETERRING LAW ABIDING MIDDLE AMERICANS FROM SEEKING EMPLOYMENT OR ENJOYING VACATIONS NEAR OUR NATION'S BOUNDARIES, AND OBSTRUCTING FREEDOM OF INTERSTATE COMMERCE.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Involved are the First, Fourth, Fifth, and Ninth Amendments to the United States Constitution, 21 U.S.C. 841(a), 8 U.S.C. 1357(a) and 8 C.F.R. 287.1(a)(2).

REASONS FOR GRANTING THE WRIT AND AMPLIFYING THE SAME

I

THE EXCEPTION ALLOWING WARRANTLESS SEARCHES UNDER 8 U.S.C. § 1357(a) AND DEFINED BY REGULATION 8 C.F.R. § 287.1(a)(2) CONTRAVENES PROTECTIONS AFFORDED BY THE FOURTH AMENDMENT.

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RIGHTS OF OUR CITIZENS DENYING THEM EQUAL PROTECTION OF THE LAWS, ABRIDGING THEIR RIGHT TO TRAVEL, COMPRESSING THEM INTO THE REFUGE OF MIDDLE AMERICA, DETERRING LAW ABIDING MIDDLE AMERICANS FROM SEEKING EMPLOYMENT OF ENJOYING VACATIONS NEAR OUR NATION'S BOUNDARIES, AND OBSTRUCTING FREEDOM OF INTERSTATE COMMERCE.

STATEMENT OF FACTS

The first witness for the Government was border patrol agent, John Bagley [R.T. 6]. He testified that the San Clemente checkpoint was 67 miles north of the Mexican-American border. Petitioner Barron drove his car into the number 2 lane and stopped at the stopsign. Agent Bagley then told him to pull over to the right. He indicated this also with his flashlight pointing the way. Petitioner crept forward, changed lanes and continued through the checkpoint. Agent Bagley never explained the purpose of Barron pulling to the right of the road - so that his car could be examined for aliens for example [R.T. 6-9].

On cross-examination, Agent Bagley stated that there were four lanes of traffic northbound in the area where he worked, but that two of the lanes were channeled off at the time. The highway

involved was Highway 101, or Interstate 5, one of the major arteries north from San Diego toward Los Angeles [R.T. 9-11].

The Government's second witness was Robert Anaya, another border patrol agent [R.T 11-12]. On August 15, 1971, he was stationed at San Clemente, north of Oceansi He observed a 1963 black Oldsmobile with California license plate IUK 131 at about 1:40 A.M. The car stopped at the stop sign, was ordered to the secondary inspection station and sped away north. Agent Anaya jumped into the customs vehicle kept for the purpose of chasing vehicles which fail to stop. Anaya turned on his red lights, put on the siren and his high beams. One half mile to the north, Barron stopped his car, jumped out and ran over into the bush [R.T. 12-14].

Apparently the car driven by Barron began to move by itself causing Agent

Anaya to chase it, back it up and park it. Anaya testified that he smelled a very strong ordor of marijuana at that time. He had smelled marijuana on several previous occasions [R.T. 14-16]. Agent Holman discovered the Petitioner crouched in a ditch perhaps 50 yards south of the car. Agent Anaya, upon observing Petitioner lying face down in the dirt, placed Barron's hands behind his back and handcuffed him. Barron then accompanied Anaya to the customs vehicle and Anaya then advised Petitioner of his rights [R.T. 16-17]. The Petitioner was then driven back to the office and checked for weapons [R.T. 17]. The handcuffs were removed and a search of Petitioner pockets produced a key ring. Petitioner had previously denied having a key for the trunk. Agent Anaya claimed that he was going to look for aliens at that time [R.T. 18]. Anaya saw what appeared to be a trunk key, gave it to Agent Cotinas and he

opened the trunk [R.T. 18].

On cross-examination, Agent Anaya denied that having smelled marijuana, he was going to search the trunk to see if marijuana was stored therein. He further conceded that aliens don't smell like marijuana [R.T.19].

The Government's final witness was Agent John Holman of the U.S. Border Patrol, San Clemente, California [R.T.20]. His first contact with the case was hearing a call over the radio and squealing tires. Agent Holman then climbed into a pursuit car which wouldn't start. He ran approximately 300 yards north on foot due to the activity there. He discovered Petitioner in the bushes [R.T. 21]. Agnet Holman drove Barron's vehicle back to the office and during the trip detected the odor of marijuana inside the car. His eyes watered and his nose became irritated.

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The odor was strong. Because the car was warm inside, it was "like being hit with a cloud of smoke, the odor and feeling." [R.T. 22]. Agent Ravinas [sic] opened the trunk to the vehicle in the presence of Agent Holman. Marijuana brinks were discovered in the trunk [R.T.23]. The Prosecution rested [R.T.24]. The motion to suppress the evidence was then argued and denied. [R.T. 24-29].

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STATEMENT OF THE CASE

On August 25, 1971, an indictment was filed in the Federal District Court for the Southern District of California accusing Petitioner, RICARDO PABLO BARRON, in Count One with a violation of 21 U.S.C. §§952, 960 and 963 (illegal importation of a controlled substance) and in Count Two with 21 U.S.C. §841(a) (1) (Possession of a Controlled Substance with Intent to Distribute) [C.T. 1-2]. The Petitioner was arraigned and entered a plea of not guilty [C.T.6].

On November 8, 1971, a Motion to Suppress the evidence under Rule 41(e) of the Federal Rules of Criminal Procedure was heard and denied [C.T.25]. On February 22, 1972, Petitioner submitted his cause before the Honorable J. Clifford Wallace, Federal District Judge, and was found guilty of Count Two of the indictment. Count One was dismissed [C.T.28]. The case was continued

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for a presentence report to March 27, 1972, at which time Petitioner was sentenced to a term of five years imprisonment - the maximum allowable under the statute [C.T.30]. A Notice of Appeal was timely filed and Petitioner was permitted to remain at liberty on appeal on a $25,000 personal surety bond. [C.T.30-33]

On January 29, 1973, the Ninth Circuit Court of Appeals affirmed the judgment. This Petition is timely filed and this Court has jurisdiction by virtue of Title 28 U.S.C. 1254 (1).

I

THE EXCEPTION ALLOWING WARRANTLESS SEARCHES WITHOUT PROBABLE CAUSE UNDER 8 UNITED STATES CODE § 1357 (a) AND DEFINED BY REGULATION 8 C.F.R. § 287.1(a)(2) CONTRAVENES PROTECTIONS AFFORDED BY THE FOURTH AMENDMENT.

We are faced with a rule in the United States 9th Circuit Court of Appeals, which stands

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in conspicuous opposition to the constitutional protections generally provided by the Fourth Amendment. Those protections threatened by this rule are based on probable cause, are "...per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well delineated exceptions" (Katz v. United States, 389 United States 347, 357, 88 S.CT. 507, 514, [1967]). The exception challenged here is not well delineated, nor have the cases demonstrated any rational grounds behind its establishment.

A. NO APPARANT REASON EXISTS WHY FOURTH AMENDMENT PRINCIPLES DO NOT APPLY WITH THE SAME FORCE TO SEARCHES OF AUTOMOBILES FOR SMUGGLED ALIENS AS THEY DO TO SIMILAR SEARCHES FOR SMUGGLED MERCHANDISE. THE TRIAL COURT ERRED IN BASING ITS EVIDENTIARY RULING UPON THIS DISTINCTION.

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Petitioner contends that absent any showing that an international boundary was crossed, or that Petitioner was under surveillance, the search without probable cause was not, and cannot be legitimized as a border search. Under the authority of 8 U.S.C. 1357, Immigration and Naturalization Service officers have the right to search automobiles for illegal aliens within a reasonable distance of an international border to prevent the illegal entry of aliens provided there is probable cause for so doing. Cervantes v. United States, 263 F.2d 800 (9th Cir. 1959). However, once it has been established that a individual has previously crossed an international border and is not presently under surveillance or pursuit, a search conducted seventy miles from the Mexican border, as in the case at bar, does not constitute a border search and is not justified absent probable cause. Thus, the Ninth Circuit

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Court of Appeals has held that the search of an automobile seventy miles from the nearest port of entry cannot be justified as a border search but must be supported by probable cause. Cervantes v. United States, supra. In the Cervantes case, a Federal customs investigator for the United States Customs Service had received information on two occasions from an informant describing the defendant and his several entries into Mexico for purchases of narcotics. Moreover, the investigator observed the defendant and his vehicle in Tijuana, Mexico, and, after checking defendant's license number, determined that the defendant had previous narcotics convictions, including one for unlawful transportation of narcotics into the United States. This information was given to border inspectors and the investigator requested that the automobile and its occupants be thoroughly searched. On that

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same date, defendant crossed the international border at Tijuana without being searched by the border inspectors and proceeded north on U.S. 101 toward Los Angeles. Federal Immigration agents at San Clemente, being in possession of the aforedescribed information, stopped the defendant and, after searching the defendant and the vehicle, arrested him for importing, transporting and concealing narcotics. The Ninth Circuit, in reversing defendant's conviction for lack of probable cause to stop and search defendant's vehicle at San Clemente, included the following remarks in a foot note regarding the Government's contention that the court could sustain the search as a border search:

"An authorized federal border official may, upon unsupported suspicion, stop and search persons and their vehicles entering this country. 19 U.S.C.A. Sec. 482. Carroll v. United States, supra, 267 U.S.

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at pages 153-154, 45 S.Ct. at page 285. But after entry has been completed, a search and seizure can be made only on a showing of probable cause. Landau v. United States, 2 Cr., 82 F.2d 285, 286; United States v. Lee Ngee How, D.C. 105 F. Supp. 517, 523. The record does not reveal the elapsed time between Cervantes' re-entry into the United States on December 8, 1955, and his arrest at San Clemente. However, we take judicial notice of the fact that San Clemente is more than seventy miles from the nearest port of entry from Mexico. There is no indication in the record that Cervantes had stopped at San Clemente in connection with a pursuit. Insofar as the record reveals, therefore, his entry had been completed prior to the time he reached San Clemente, and the government does not contend otherwise." Cervantes v. United States, 263 F.2d 800, 803, n.5. [Emphasis added.]

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It is submitted that in the case at bar, the factual circumstances surrounding petitioner's detention and the search of his vehicle at San Clemente demonstrate that the grounds for searching the vehicle driven by the petitioner are far more tenuous than those in the Cervantes decision and that, therefore, absent independent probable cause for detaining and searching defendant's vehicle, and evidence sought to be introduced be suppressed as not incident to a valid international border search. See, also, United States v. Hortze, 179 F. Supp. 913, 918 (D.C. Calif. 1959). To conclude otherwise, not only the petitioner, but all residents of San Diego, or indeed, visitors who travel northbound to other parts of California would by virtue of travelling on Interstate Highway 101, surrender their Constitutional protection against unreasonable searches and seizures; and this is true whether or not the persons involved ever

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crossed the border. Petitioner did not! Such an argument is certainly fatuous and invalid.

Respondnet in his trial brief in opposition to our earlier motion to suppress unctuously stated: "Defendant in his moving brief has confused the different rules for searches for contraband and searches for aliens in his attempt to graft the probable cause standards of the narcotics cases (Cervantes) onto the rules justifying immigration inspections."

Justice Browning, in his dissenting opinion in Almeida-Sanchez, vehemently shares our continuing "confusion."

"If a reason exists for distinguishing searches for aliens from searches for merchandise, no one - including this court- has yet suggested what it might be. Nothing in the words of the Constitution supports the distinction, and no one suggests that the public interest in excluding inadmissible

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aliens is greater than that in excluding narcotics and other contraband". U.S. v. Almeida-Sanchez, 452 F. 2d 459 (1971) We therefore, continue to assert the applicability of Fourth Amendment protections to the present case, despite the absurd application of 8 U.S.C. § 1357 (a) which threatens to deny those protections. If the rational distinction which Judge Browning as well as petitioner fail to find, exists, we demand to know what it is before petitioner abandons the assertion of rights Constitutionally protected by the Fourth Amendment.*

---

* The trial record clearly discloses that not even the trial judge believed the search of the vehicle driven by petitioner, was aimed

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at the discovery of aliens. He declared, "...I don't think, when they looked in the car in the trunk, they were looking for aliens,..." (R.T. 29)

II

THERE WAS NO PROBABLE CAUSE TO JUSTIFY THE DETENTION OR SEARCH OF PETITIONER'S VEHICLE AT SAN CLEMENTE.

The only reason given by the Federal Immigration Agents for detaining petitioner indicating their intention to search his vehicle without first procuring a search warrant, was their observation that the rear of his vehicle appeared to be riding lower than the front of his vehicle. This observation, absent sufficient additional information, such as knowledge of prior criminal activity of an individual or reliable information that he is engaged in illegal activity, does not constitute probable cause for searching the vehicle. First,

unlike in United States v. Haith, 297 F. 65 (4th Cir. 1961), cert. den. 369 U.S. 804, 82 S. Ct. 643, and United States v. Wilson, 159 F. Supp. 149 (D.C. Ala. 1957), cert. den. 358 U.S. 865, 79 S. Ct. 97, the Federal Immigration Agents in the case at bar, had no knowledge or information pertaining to petitioner's reputation, nor did they smell any odor emanating from his vehicle sufficient to justify their search. Second, unlike in United States v. Walker 307 F.2d 250 (4th Cir. 1962), the agents had had no previous observations of the petitioner engaged in illegal activity, nor did they have any reliable information from an informant linking Barron with illegal activity.

As discussed in Part IA, supra, far more compelling arguments in Cervantes than are present in petitioner's case, were ruled insufficient to establish probable cause. (See also, People v. Gale, 46 Cal 2d 253,

294 P. 2d 13 (1956) (damage to vehicle insufficient justification for border search of vehicle leaving the United States.)

In fact, the question of whether probable cause existed which would justify the detention and threatened search, is of no moment here since the Trial Judge validated the agent's authority under this Court's decisions permitting unrestricted searches of automobiles at border checkpoints. (R.T. 29)

A./ THERE IS NO RATIONAL JUSTIFICATION FOR ALLOWING 8 U.S.C. § 1357 (a) TO SERVE AS A BLANKET EXCEPTION TO THE FOURTH AMENDMENT REQUIREMENT OF PROBABLE CAUSE.

In further stressing the absurdity of 8 U.S.C. § 1357 (a) which allows warrantless searches without probable cause, petitioner urges the court to note that the judicial

trend is in the opposite direction, ie., toward a narrowing of exceptions which allow warrantless searches toward strict enforcement of the probable cause requirement, and to a narrowing of the scope of searches to eliminate the obtrusive "exploratory" search.

For example, Coolidge v. New Hampshire, (1971) 403 U.S. 443, 91 S. Ct. 2022, limited the Chambers rule which allowed warrantless searches of vehicles (with probable cause) in motion when seized. This undeniably represents the court's wish to limit the exception of the "movable auto" exigency. Yet, under 8 U.S.C. § 1357, and under the guise of a search for "aliens", any auto within 100 miles of an external boundary could be searched without a warrant in possible violation of Coolidge, and without probable cause in violation of the Supreme Court mandate in both Coolidge and Chambers.

Section 1357 potentially renders such cases meaningless.

Further, the probable cause requirement has been held subject to limitations dictated by alleged criminal activity, and by the "reasonable" expectations of the officers under the circumstances. In People v. Superior Court (Kiefer), 3 Cal. 3d 807, 91 Cal. Rptr. 729 (1970), the Court stated that even when there is probable cause to arrest, a search for weapons must remain "reasonable in scope".

> "Just as the arresting officer in an ordinary traffic violation case cannot reasonably expect to find contraband in the offender's vehicle, so also he cannot expect to find weapons ... would likewise constitute an 'intolerable and unreasonable' intrusion into the privacy of the vast majority of peaceable citizens

who travel by automobile. It follows that a warrantless search for contraband must be predicated...on specific facts or circumstance giving the officer reasonable grounds to believe that such weapons are present in the vehicle he has stopped." [3 Cal. 3rd at 829, 91 Cal. Rptr. at 744.]

Indeed, very recently in California, the limitation of scope of search incidental to arrest articulated in Chimel v. Calif. (1969) 395 U.S. 752, 89 S. Ct. 2034 has been applied to searches of automobiles. (People v. Koehn, 102 Cal Rptr. 102 May 1972). These decisions dictate that a search without a warrant can be conducted in a non-emergency situation, only if the search coincides with a lawful arrest or detention and is restricted to the arrestee's person or area "within his immediate control (395 U.S. at 762-2). Yet, under § 1357,

no warrant is required, no probable cause, no lawful arrest and no restriction of scope of search. One has only to "look for" aliens, and the Fourth Amendment protections supported by the above decisional law vanish.

Other cases have limited the use of "furtive gestures" as a basis for probable cause to search. (Gallik v. Superior Court of Santa Clara County, 5 Cal. App. 3d 862, 97 Cal Rptr. 693 (1971); People v. Cassel, 23 Cal App 3d 715, 100 Cal Rptr, 520 (1972), People v. Williams, 20 Cal App. 3d 590, 97 Cal. Rptr. 815 (1971)). That limitation is meaningless if the probable cause requirement is abandoned.

Finally, the courts in California have tried to put a halt to the more obvious abuses of the authority of the police to "inventory" the contents of automobiles lawfully in their custody pursuant to the

removal and storage provisions of the vehicle code. [Mozzetti v. Superior Court, 4 Cal App. 3d 699, 94 Cal. Rptr. 412 (1971); see also, People v. Heredia, 20 Cal. App. 3d 194, 97 Cal. Rptr. 488 (1971) [Mozzetti rule not merely prospective in effect]; Virgil v. Superior Court, 268 Cal. App. 2d 127, 73 Cal. Rptr. 793 (1968).]

In Mozzetti, there was no arrest, nor probable cause. The court saw no rational grounds for diluting Fourth Amendment protection namely for "inventory" purposes.

The court in Koehn, quoted the following from Justice Stewart's opinion in Coolidge:

> ...the word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears. (Coolidge v. New Hampshire, supra, 91 S. Ct. 2022, 2035)

Following Mozzetti, the word "inventory" may no longer serve as the catalyst

disintegrating the Fourth Amendment protections. Unfortunately, one such "talisman" remains: the word "alien". Petitioner strongly denies existence of any rationale for this exception. He rightfully demands an explanation before he submits to what can now only be termed a blatant disregard of his Fourth Amendment rights under the constitutionally invalid mandate of 8 U.S.C. § 1357.*

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* The Ninth Circuit Court of Appeals has itself made inroads on the Carte Blanche justification for even border searches. See Henderson v. United States (9th Cir. 1967), 390 F.2d 805. (probable cause essential to support search of body cavities).

B./ THE FACT THAT PETITIONER DID NOT STOP IN THE AREA INDICATED BY THE AGENTS, BUT PROCEEDED THROUGH THE BLOCKADE, IS NOT RELEVANT TO WHETHER THE OFFICERS HAD PROBABLE CAUSE TO SEARCH.

The cases are numerous which hold that if an officer threatens to arrest or search at a time when he has no legal right to do so, and this engenders a response in the suspect, such as discarding contraband or acting furtively, that conduct so engendered is not usable in establishing probable cause for a search or arrest. Wong Sun v. United States, 371 U.S. 483 S. Ct. 407 (1963); People v. Cedeno, 218 Cal. App. 2d 213, 32 Cal. Rptr. 246 (1963). In Wong Sun v. United States, 371 U.S. 477, 483, n.10, the United States Supreme Court opined:

"...we have consistently doubted the probative value in criminal trials of

of evidence that the accused fled the scene of an actual or supposed crime.....it is not universally true that a man who is conscious that he has done a wrong, 'will pursue a certain course not in harmony with the conduct of a man who is conscious of having done an act which is innocent, right, and proper', since it is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that 'the wicked flee when no man pursueth, but the rightous are as bold as a lion.'"

Accord, People v. Superior Court (Kiefer), supra; People v. Shelton 60 Cal. 2d 740, 747 (1964); Tompkins v. Superior Court, 59 Cal.

2d 65, 68 (1963); Badillo v. Superior Court, 46 Cal. 2d 269, 294 P.2d 23 (1956); Gascon v. Superior Court, 169 Cal. App. 2d 356, 337 P.2d 201 (1959); People v. Harvey, 142 Cal. App.2d 728, 299 P.2d 310 (1956).

III

THIS COURT MUST IN ACCORD WITH ITS CONSTITUTIONAL DUTY TO ANNUL STATUTES AND REGULATIONS VIOLATIVE OF THE CONSTITUTION STRIKE DOWN THIS UNWARRANTED GOVERNMENTAL BID FOR LEBENSRAUM AS IMPLEMENTED BY GOVERNMENTAL REGULATIONS RESCINDING THE SEARCH SEIZURE RIGHTS OF OUR CITIZENS, DENYING THEM EQUAL PROTECTION OF THE LAWS, ABRIDGING THEIR RIGHT TO TRAVEL, COMPRESSING THEM INTO THE REFUGE OF MIDDLE AMERICA, DETERRING LAW ABIDING MIDDLE AMERICANS FROM SEEKING EMPLOYMENT OR ENJOYING VACATIONS NEAR OUR NATION'S BOUNDARIES, AND OBSTRUCTING FREEDOM OF INTERSTATE COMMERCE.

It has been clear since Marbury v. Madison, 1 CRANCH 137 (1804) that Congress can neither make nor enforce a law, rule, or regulation which is counter to the United States Constitution. This principle is the bedrock of our form of government,

yet Congress and State legislatures and Administrative agencies, have sometimes overstepped the bounds of our Constitution. It is the Judiciary's duty to be watchful for citizen's constitutional rights. Boyd v. United States, 116 U.S. 616, 6 S. Ct. 524 (1886). When a person brings a proper case complaining of infringements of constitutional rights, the judicial branch of our Government must ascertain the validity of suspect laws passed by our legislative bodies, and at least as great a duty exists when administratively passed regulations are challenged. Individuals must be protected from both willful and unwitting encroachment upon their constitutional rights. "This duty cannot be discharged as though it were a mere procedural formality." Von Moltke v. Gillies 332 U.S. 78, 68 S. Ct. 316. It must be thoroughly and thoughtfully

considered. Here, by the stroke of a pen, the Government has eliminated Fourth Amendment protections for a majority of our 200 million citizens. (See Appendix A). One of the laws here in question, 8 U.S.C. 1357 (a), allows searches of vessels and vehicles for aliens with no need of obtaining a search warrant and without even probable cause, as long as within a "reasonable distance" of an external boundary. Implementing this law is 8 C.F.R. 287.1(a) (2), which defines "reasonable distance" as 100 air miles from any external boundary. Recent cases have accepted these laws more by rote than by reason. An example is United States v. Almeida-Sanchez, 452 F.2d, 459 (1971) which is now pending in this Court.

Here, the court must not only analyze the ends of the 8 U.S.C. 1357 (a) and 8 C.F.R. 287.1(a)(2) but must also examine their menas to determine if they comport

with constitutional standards.

In similar legislation, 19 U.S.C. 482, Congress literaloy authorized searches for foreign contraband anywhere in the United States without either a search warrant or probable cause. The courts, doing their duty, have understandably balked at such broad authorization and have required probable cause to search unless it is a border search. Cervantes v. United States 263 F.2d. 800 (9th Cir. 1959).

If these rules are upheld, the people of the following cities, Seattle, San Francisco, Los Angeles, San Diego, Phoenix, San Antonio, Houston, New Orleans, Miami, Baltimore, Philadelphia, Pittsburg, New York, Buffalo, Cleveland, Columbus, Detroit and Washington, D. C.; (cities in excess of 500,000 people) plus the entire population of the states of Florida, Delaware, New Jersey, Connecticut, Rhode Island, Maine, New Hampshire, Vermont and Hawaii, 59

million people, can be stopped and their vehicles searched without probable cause, and as the law is stated, without any justification. If we were to further include cities of less than one-half million people, we would learn that the preponderant majority of Americans are subject to the loss of their search and seizure rights under existing legislation. (See Appendix A).

The right to be free from unreasonable searches and seizures, is inextricably interwoven into the fabric of our society. Yet, the Government has arbitrarily chosen, 100 miles from an external boundary as a "no Fourth Amendment Rights" zone. In this zone, Government agents can take away Fourth Amendment protections when riding in vehicles.

Chief Justice Taft in Carroll v. United States, 267 U.S. 132, 153-154, 45 S.Ct. 280,

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285, (1925) said:

"It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.." [Emphasis added]

Furthermore, 8 U.S.C. 1357(a) and 8 C.F.R. 287.1(a) (2) read together, run afoul of the equal protection provisions of the Fifth Amendment. Distance from the beach or any other external boundary should not be a criterion for determning the extent

of one's constitutional rights. The resident of Miami cannot be afforded lesser constitutional rights than the residents of Kansas City. It amounts to an "invidious discrimination" of the most rank sort. See e.g. McLaughlin v. Florida, 379 U.S. 184, 190, 194, 85 S. Ct. 283 (1964); Douglas v. California, 372 U.S. 353, 356, 83 S. Ct. 814 (1963); Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S. Ct. 110 (1942). These laws also inhibit the right to travel. Travel restrictions within the United States were struck down long ago. In Kent v. Dulles, 357 U.S. 116, 125-126, 78 S. Ct. 1113, 1118, (1958). Justice Douglas stated for the court:

> "The right to travel is a part of the 'liberty' of which citizens cannot be deprived without the due process of law under the Fifth Amendment...In Anglo-Saxon Law, that right was emerging -

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at least as early as the Magna Carta.. Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. ... travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values."

Aptheker v. Secretary of State, 378 U.S. 500, 84 S. Ct. 1659 (1964), Zemel v. Rusk, 381 U.S. 1, 85 S. Ct. 1271 (1965).

Justice Stewart reiterated the fundamental nature of the right in United States v. Guest, 383, U.S. 745, 757-758, 86 S. Ct. 1175, 1778 (1966):

"The constitutional right to travel.. occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established

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and repeatedly recognized..In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution."

In the landmark decision of Shapiro v. Thompson, 394 U.S. 618, 629-630, 89 S. Ct. 1322, 1329 (1969) Justice Brennan declared for the majority:

"This court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth or our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement. That proposition was early stated by Chie Justice Taney in the Passenger Cases, 7 How. 283, 492, 12 L. Ed. 702 (1849)."

Clearly in the present case, the government

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has unreasonably, and without justification, burdened the right to travel. See also Edwards v. California, 314 U.S. 160, 62 S. Ct. 164 (1941), Aptheker v. Secretary of State, 378 U.S. 500, 84 S. Ct. 1659 (1964), Zemel v. Rusk, 381 U.S.1, 85 S. Ct. 1271 (1965). The regulations here in question will put a chill on the choice of where to travel. If every midwesterner feared the possibility of searches at any time without probable cause, he would certainly be deterred from traveling to or near any external boundary. "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures." Katz v. United States, 389 U.S. 347, 359, 88 S. Ct. 507, 515 (1967). It has therefore, been undeniably established that the right to travel is a "fundamental" constitutional right. We recognize that freedom of travel, like freedom of speech, may be subject to

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reasonable limitations as to time and place. The government, if not the Court, may take comfort in the fact that existence of a "compelling governmental interest" necessary to justify infringement of a fundamental constitutional right finds precedent in the notorious, if not celebrated case of Korematsu v. United States, 323, U.S. 214, 65 S. Ct. 193 (1944). Though the Court has been understandably reluctant to refer to Korematsu, the case held that:

> "The liberty of every American citizen freely to come and go must frequently, in the face of sudden danger, be temporarily limited or suspended."(323 U.S. at 231), See also Hirabayashi v. United States, 320 U.S. 81, 63 S. Ct. 1375 (1943).

Here was justification for the internment of thousands of Japanese, 80% of whom were American citizens by birth. Where is the 'sudden danger' which could justify the present restriction? A rising crime rate?

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The war in Vietnam? Very obviously, no exigency exists as justification.

Further, Justice Roberts dissented in Korematsu from what he considered too broad a restriction on the right to travel. At least a temporal limitation was inherent in that situation. The right to travel under a literal reading of §1357 (a), on the other hand, is restricted indefinitely. The overbreadth of §1357(a) and lack of a compelling governmental interest to justify the blatant infringement of the fundamental right to travel, demand that it be ruled unconstitutional.

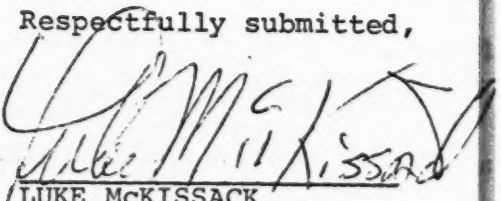
This inhibiting of the right to travel also has interstate commerce implications. The chilling effect will dissuade people from traveling from mid-america states to border states. thus decreasing the flow of commerce and impairing the commercial viability of, for example, motels, restaurants, and

gas stations along interstate routes. See Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 85 S. Ct. 348 (1964).

CONCLUSION

For the aforegoing reasons, the judgment should be reversed and the case dismissed.

Respectfully submitted,



LUKE McKISSACK
Attorney for Petitioner -
Barron

APPENDIX "A"

The Government's position requires that either the majority of the residents of our great nation be kept ignorant of the loss of their constitutional guarantees or commence a mass exodus to middle-America to reclaim them.* Dodge City may in truth again become the bastion of law and order. It would seem that such a mass evacuation of people seems unjustified by the whimsical need to maintain border checkpoints 100 miles away from our borders.

Refer to Illustration A for a graphic rendering of those persons potentially excluded from Fourth Amendment protections. The area outside of the heavy black line and within United States continental boundaries, represents the 100 mile "reasonable distance" zone set forth in 8 U.S.C. 1357 (a) and 8 C.F.R. 287.1(a)(2).

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* Of course, we exclude those solid citizens who may wish to exercise their Constitutional right to travel to coastal areas to gain employment, vacation or visit their relatives and friends.

APPENDIX "B"

FILED
JAN 29 1973
DENNIS R. MATHEWS, CLERK
U. S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)

Plaintiff-Appellee,)

vs.) No. 72-1877

RICARDO PABLO BARRON,)

Defendant-Appellant.)

Appeal from the United States District Court for the Southern District of California

Before: TRASK and CHOY, Circuit Judges, and TALBOT SMITH, District Judge*

PER CURIAM:

Ricardo P. Barron appeals from a judgment of conviction for violation of 21 U.S.C. § 841(a)(1), possession of a controlled substance with intent to distribute. We affirm.

On August 15, 1971, at about 1:40 a.m., appellant, the sole occupant of a 1963 Oldsmobile, approached the Border Patrol checkpoint at San Clemente, traveling north. An agent noticed that the car was riding low in the rear, and after observing nothing in the rear seat of the vehicle to account for this, the agent directed appellant to the secondary inspection area. The agent testified that the purpose of this secondary check was to examine the vehicle for illegal aliens, although this purpose was not announced

* Hon. Talbot Smith, Senior United States District Judge, Eastern District of Michigan, sitting by designation.

to the appellant.

Appellant pulled over, slowed, and then sped off. Another agent pursued, and approximately one-half mile north, appellant abandoned his vehicle and ran from the roadway. Since appellant's vehicle was still moving, the agent chased and parked that car, and during this time he detected a very strong smell of marijuana from inside the car. A third agent found appellant lying face down in a ditch some fifty yards to the southeast. This agent drove the suspect vehicle to the checkpoint, during which time he also detected the odor of marijuana inside the car.

Appellant was brought back to the Border Patrol Office and he responded when asked, that he had no key to the trunk. A trunk key was found in his pocket. Still claiming a search for illegal aliens, a fourth agent opened the trunk and found it full of kilo bricks of marijuana.

There is no doubt that if the original stop in this case was justified, the agents had probable cause to search for aliens and for contraband at the time they opened the trunk of appellant's vehicle at the checkpoint. The car was stopped for interrogation because it was hanging low in the rear. Barron's flight, his jumping from the car while it was in motion and attempting to hide face down in a ditch, added probable cause, United States v. Aranda, 457 F.2d 761 (9th Cir. 1972); Duprez v. United States, 435 F.2d 1276 (9th Cir. 1970), to search for aliens.[1/] Further, the fact that an agent familiar with the odor of marijuana, smelled such an odor emanating from the automobile when he jumped in to stop

it, alone was sufficient to constitute probable cause for a subsequent search for marijuana. United States v. Leazar, 460 F.2d 982 (9th Cir. 1972); Fernandez v. United States, 321 F.2d 283 (9th Cir. 1963).

The search of the vehicle at the checkpoint rather than at the point on the highway where it was stopped was permissible. Chambers v. Maroney, 399 U.S. 42, 52 (1970); United States v. Aranda, supra.

The crucial issue is the legality of the original stop. In the present case, there was a clear government interest in preventing and detecting the illegal entry of aliens into the United States. A checkpoint had been set up on Interstate 5, a major north-south highway extending to the Mexican border, at a location where transportation of aliens who had illegally entered the United States was known to occur. The officer had observed an older model car at 1:40 a.m., which appeared to be carrying a heavy load in the rear. We have held that it is constitutionally permissible to detain persons briefly under circumstances not justifying an arrest for purposes of limited inquiry in the course of routine police investigation. United States v. Oswald, 441 F.2d 44, 46 (9th Cir. 1971). From that point on, probable cause to search developed rapidly and indisputably.[2/]

The search for aliens resulting from that probable cause uncovered approximately 600 pounds of contraband in plain view in the trunk compartment. For this obvious law violation the immigration officers had authority to arrest. United States v. Maggard, 451 F.2d 502, 504 (5th Cir. 1971).

Judgment affirmed.

Footnote 1 (Reference page 2)

Appellant relies on a footnote in Wong Sun v. United States, 371 U.S. 471, 483 n.10 for his contention that flight does not generate a sufficient basis for inferring probable cause. In light of the Ninth Circuit cases cited in the text, and the fact that the Supreme Court in Wong Sun was discussing probable cause for arrest, this contention is rejected.

Footnote 2 (Reference page 3)

The present case is factually different from United States v. Almeida-Sanchez, 452 F.2d 459 (9th Cir. 1971), cert. granted, 406 U.S. 944 (1972) (No. 71-6278). The situation in Almeida involved Border Patrol officers maintaining a random roving check of all vehicles in an area. 452 F.2d 460, 467 n.16, 468.

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APPENDIX "C"

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
U. S. Court of Appeals and Post Office Building
7th & Mission Streets, P. O. Box 547
San Francisco, California 94101

RECEIVED JAN 30 197

Re: No. 72-1877 USA VS. RICARDO PABLO BARRON

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered 1-29-73

Affirmed.

the judgment or order of the court below (or administrative agency).

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,

Dennis R. Mathews,
Clerk of Court



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ILLUSTRATION A



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